

## A MINIMUM WAGE LAW FOR HONG KONG



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The enactment of the Minimum Wage Ordinance (MWO) in July 2010 was a milestone of sorts in the history and development of Hong Kong's law and economy. It marks arguably the most serious legislative incursion to date into Hong Kong's much vaunted free market economy, rivalled only by the enactment of the discrimination ordinances in the 1990s. The MWO resonates more because of its explicit economic implications. It will no doubt place in jeopardy Hong Kong's standing as the freest economy in the world.<sup>1</sup>

However, there is nothing terribly revolutionary about a minimum wage law. Indeed, it is rather surprising, with a civil society as developed as Hong Kong's, even taking into account the absence of a legislature fully elected by universal suffrage, that a minimum wage law was so late in coming. The International Labour Organization Convention 26 (ILC 26) provided for wage-fixing machinery for selected trades as long ago as 1928.<sup>2</sup> By that time such laws had already been introduced in a number of western democracies. For that matter, although unknown to most, minimum wage legislation in Hong Kong was on the books 78 years ago, in the form of the Minimum Wage Ordinance 1932,<sup>3</sup> which gave effect to ILC 26 and conferred powers on the Governor to fix minimum wages for the lowest paid workers.<sup>4</sup> Moreover, the principle itself has been implicitly recognised in Hong Kong for more than 30 years in the form of the minimum wage policy that applies to migrant domestic workers.<sup>5</sup>

So why the delay in introducing a general minimum wage law in Hong Kong? For at least 50 years, successive Hong Kong Governments, with the support of the business lobby have jealously guarded the laissez-faire economic policy of positive non-interventionism introduced in the

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<sup>1</sup> The US-based Heritage Foundation's 2010 Index of Economic Freedom ranked Hong Kong as the world's freest economy for the 16th consecutive year: see <http://www.heritage.org/index/country/HongKong>.

<sup>2</sup> Minimum Wage-Fixing Machinery Convention 1928, viewable at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C026>. C26 has now been complemented by the more comprehensive C131, Minimum Wage-Fixing Convention 1970: <http://www.ilo.org/ilolex/english/convdisp1.htm>. Today, 90% of the ILO's 183 members have minimum wage laws in place: Global Wage Report 2008-09, p 34, at [http://www.ilo.org/public/libdoc/ilo/P/09258/09258\(2008-09\).pdf](http://www.ilo.org/public/libdoc/ilo/P/09258/09258(2008-09).pdf)

<sup>3</sup> No. 28 of 1932.

<sup>4</sup> However, like the Trade Boards Ordinance (No 15 of 1940) that replaced it, it was never acted upon.

<sup>5</sup> For the minimum allowable wage applicable to migrant domestic workers see Labour Department web site at <http://www.labour.gov.hk/eng/plan/iwFDH.htm>.

1960s by the Financial Secretary John Cowperthwaite in the belief that free market principles are the best guarantor of economic prosperity for Hong Kong. This view persists today.<sup>6</sup> An indication of how far and quickly we have travelled is revealed in this reply by the Secretary for Education and Manpower in the 23 Sept 1998 Legislative Council Proceedings to a question about the introduction of a minimum wage law:

“The Government has no intention of establishing a minimum wage system. This is because in a free market like Hong Kong, wage levels vary from trade to trade and from time to time depending primarily on the demand and supply of labour and the prevailing business environment. We do not consider it appropriate for the Government to interfere with the free market by setting a minimum wage for any particular trade”.<sup>7</sup>

The enactment of the law would not have occurred but for the persistence of trade unionists, NGOs and labour representatives in the Legislative Council, whose campaign can be traced back more than a decade, at least to the so-called Asian Financial crisis of the late 1990s.<sup>8</sup> In fact, the battle for a minimum wage law appeared to be gaining little headway, until 2005 when the then Chief Secretary Donald Tsang was suddenly thrust onto the centre of the political stage by the unexpected resignation of the incumbent Chief Executive, Tung Chee-hwa. During the 2006 election campaign Tsang promoted himself as a populist candidate and publicly expressed concern about low wages and the need to address poverty.<sup>9</sup> The first step towards a minimum wage law came later in 2006, with the introduction of the controversial Wage Protection Movement (WPM), a non-statutory scheme premised on the dubious hope that employers of security guards and cleaners would, if invited, voluntarily raise wages to the market's median rate.<sup>10</sup> Initially derided by trade unionists and social critics

<sup>6</sup> The Hong Kong Government Yearbook 2008, Ch 5 (Commerce and Industry) puts it thus: “Hong Kong’s continuing economic success owes much to ... the free flow of capital ... and the Government’s firm commitment to free trade and enterprise ... the Government facilitates commerce and industry within the framework of a free market”: available at <http://www.yearbook.gov.hk/2008/en/pdf/E05.pdf>. For a brief account of Cowperthwaite’s economic philosophy, see <http://www.telegraph.co.uk/news/obituaries/1508696/Sir-John-Cowperthwaite.html>.

<sup>7</sup> See Official Record of Proceedings at <http://www.legco.gov.hk/yr98-99/english/counmtg/hansard/980923fe.htm>.

<sup>8</sup> For a useful resource mapping the history of the struggle for a minimum wage law and some of the main players involved, see the Manpower Panel Database on Particular Policy Issues at [http://www.legco.gov.hk/database/english/data\\_mp/mp-min-wage.htm](http://www.legco.gov.hk/database/english/data_mp/mp-min-wage.htm).

<sup>9</sup> See eg J Cheung, “Can-do Tsang Lays Down His List of Must-dos”, *South China Morning Post*, 21 Mar 2006.

<sup>10</sup> From the beginning the focus of concern has been on the security guards and cleaners, considered to be the lowest paid and the most vulnerable to exploitation: see Legislative Council Proceedings, 23 Sept 1998, *ibid*.

as disingenuous,<sup>11</sup> Stephen Ip Shu-Kwan, then Secretary for Economic Development and Labour, defended the WPM and promised a minimum wage law if the WPM failed.<sup>12</sup> It did fail, as the Government itself acknowledged, with a disappointing level of participation by major employers.<sup>13</sup> The Government proved good on its word, a public consultation was initiated and vigorous debate ensued in the media. As the debate progressed, the Government's policy that the law should apply only to security guards and cleaners, as contemplated in the WPM itself, was mercifully abandoned, if only because of the obvious argument that if security guards and cleaners were the only groups with unacceptably low wages, the law could be extended to everyone at no cost.<sup>14</sup> Of course, media attention<sup>15</sup> regarding Hong Kong's Gini co-efficient,<sup>16</sup> exposing Hong Kong's wealth gap as the largest in the world amongst developed economies, increased the pressure on the Government to introduce a law that would apply across the board.<sup>17</sup> The initial statutory minimum wage (SMW) of \$28 per hour was finally set by the Chief Executive in Nov 2010,<sup>18</sup> with the main provisions of the law including the SMW itself to come into effect on 1 May 2011.<sup>19</sup>

<sup>11</sup> See eg A Lam, "Fresh Call for Minimum Wage Law", *South China Morning Post*, Oct 8, 2007; see also P Bowring, "Halting the Slide", *South China Morning Post*, 25 June 2007.

<sup>12</sup> Winnie Chong, "Minimum Wage Law in the Works", *The Standard*, 3 Jan 2007.

<sup>13</sup> According to official sources only 52 per cent of cleaners and security guards benefited to any degree from the scheme: see 26 Oct 2008 Labour and Welfare Bureau Press Release at <http://www.lwb.gov.hk/eng/author/26102008.htm>.

<sup>14</sup> The Legislative Council Brief explained that the reason for the policy shift was "in recognition of the mobility of workers amongst different low-paying sectors, the difficulty in defining cleaning workers, and the fact that there are other occupational groups which are paid less than cleaning workers and security guards": [http://www.legco.gov.hk/yr08-09/english/bills/brief/b24\\_brf.pdf](http://www.legco.gov.hk/yr08-09/english/bills/brief/b24_brf.pdf). Of course there was plenty of evidence of other low-paid sectors, in particular, the fast-food industry: see eg A Lam, "Union Calls on Government to set Statutory Minimum Wage at \$33", *South China Morning Post*, 25 Apr 2009, citing a survey by the Catering and Hotels Industries Employees General Union that the hourly rate at seven fast food chains was as low as \$18.94. The article reported that of the other fast food chains surveyed, McDonald's, Maxim's MX, Yoshinoya and Pizza Hut offered an hourly rate of between HK\$20.29 and HK\$23.71.

<sup>15</sup> See eg D Sin, "HK Income Gap Widest Among Rich Countries", *South China Morning Post*, 23 Oct 2009; and M O'Neill, "Anger Grows over Wealth Inequality", *South China Morning Post*, 30 Mar 2010.

<sup>16</sup> The Gini coefficient, named after the Italian statistician Corrado Gini, is one of several measures of income inequality, but the one most commonly referred to in recent years. It is a number between 0 and 1, where 0 corresponds with perfect income equality (everyone has the same income) and 1 corresponds with perfect inequality (in theory, one person would hold all the income).

<sup>17</sup> According to the United Nations' 2009 Human Development Report, Hong Kong scored the highest Gini co-efficient (43.4) among the world's 38 "very high human development" economies: <http://hdrstats.undp.org/en/indicators/161.html>.

<sup>18</sup> LN 145. The Government accepted the recommendation of the Provisional Minimum Wage Commission; see G Cheung, A Nip and A Lee, "Minimum Wage Law to help 300,000", *South China Morning Post*, 11 Nov 2010, p A2. In future, the Minimum Wage Commission, established under s 11, is required to undertake a review of the SMW at least once in every two years (s 14).

<sup>19</sup> Section 1 of the Ordinance provides that the Ordinance will come into effect on a day to be appointed by the Hong Kong Secretary for Labour and Welfare by notice published in the gazette. This has now been fixed at 1 May 2011: see LN 147.

The purpose of the MWO, as expressed in the long title, is to provide for a minimum wage at an hourly rate. The minimum wage for an employee for a wage period is the amount derived by multiplying the total number of hours worked by an employee in the wage period by the statutory minimum wage rate. "Hours worked" in a wage period include any time during which the employee is in attendance at the place of work or travelling in connection with the employment.<sup>20</sup> The "wage period" is the period in which wages are payable under the employment contract, and unless the contrary is proved, is one month.<sup>21</sup> "Wages" has the same meaning as in the Employment Ordinance, and thus is very broad. It is to be observed that whereas the widest possible interpretation of "wages" serves employees' interests under the Employment Ordinance,<sup>22</sup> it is otherwise under the MWO, where employers will be keen to argue that the SMW has been paid if other emoluments and benefits are taken into account.

By s 7 the MWO applies to every employee and his/her employer, except persons engaged under a contract of apprenticeship, domestic workers who dwell in the household of the employer free of charge,<sup>23</sup> student interns<sup>24</sup> and work experience students.<sup>25</sup> There are special provisions regarding persons with disabilities (PWD) who hold a valid registration card issued by the Central Registry for Rehabilitation established by the Government. By s 9A a PWD may agree with his/her employer after a four-week trial period (or until the completion of assessment of productivity, if earlier) a rate which is not less than 50 per cent of the prescribed minimum wage. After obtaining the relevant certificate of assessment, the hourly wage rate of the PWD shall be calculated with reference to the assessed degree of productivity.

The MWO provides little in the way of additional enforcement mechanisms, beyond that already provided in the Employment Ordinance. It is of course an offence under the Employment Ordinance to pay less than the SMW, but it will be left to employees to police the system, and to

<sup>20</sup> MWO, s 4.

<sup>21</sup> MWO, s 5.

<sup>22</sup> Calculation of benefits such as holiday, vacation, maternity and severance pay are based on an employee's wages.

<sup>23</sup> This is a controversial issue. The justifications for the exclusion of live-in domestic workers as expressed in the Legislative Council Brief (note 14 above) accompanying the Minimum Wage Bill are not well made out. The "round-the clock presence" of such workers, the difficulty of keeping a record of hours worked, the "in-kind" benefits such as accommodation and food included in the contractual package do not pose insurmountable problems. The suggestion that because a worker works long and uncertain hours, he/she should be excluded does not sit well with the spirit of social reform legislation. This is a large issue which cannot be addressed here.

<sup>24</sup> As defined in s 2.

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bring civil actions in the Labour Tribunal for under-payment, as with any other claim for a sum of money under the Employment Ordinance. This will be cumbersome.<sup>26</sup> A useful step would be to establish a hot-line for employees to report recalcitrant employers. Such a system should be designed to ensure the reporting employee's anonymity. Moreover, the Labour Department should be empowered to enter work premises and inspect employee pay records without notice.<sup>27</sup>

The success of the new law will depend to a large degree on the resolve of the Government in ensuring its enforcement, and on the approach of the Minimum Wage Commission in recommending the SMW in its periodic reviews. The s 12 considerations that are to guide the Commission in making its recommendations are open-ended and somewhat worryingly, place more emphasis on safeguarding Hong Kong's economy than on minimising poverty and reducing the wealth gap.

The success of the new law will also depend on the spirit in which it is taken by the employers' side. The highly publicised skirmish between the Café de Coral restaurant chain and its employees provides an example of the sort of attitude that could derail the objectives of the new law. In anticipation of the pay rises required under the MWO, the Café de Coral company offered to raise wages, in exchange for the withdrawal of a paid lunch break, a benefit that it had always offered its staff. The effect of this move was to leave many workers with a net decrease in take-home pay, while only a few would enjoy an increase, and only a very modest one at that. After much negative publicity in the media,<sup>28</sup> the threat of industrial action by staff, and the threat of consumer boycotts,<sup>29</sup> the company backed down from this position, and restored the paid lunch break,<sup>30</sup> to the relief of all, including, no doubt, the Government.

It is to be hoped that this incident and its outcome will deter other employers from adopting this or other means of creative wage-cutting

<sup>26</sup> By comparison, the UK National Minimum Wage Act 1998 provides more in the way of deterrence. Section 10 entitles a worker who reasonably believes he has been underpaid to have access to the employer's wage records. In the event of refusal, the worker may complain to an employment tribunal under s 11. The tribunal may order payment of 80 times the amount of the minimum wage in the event of underpayment.

<sup>27</sup> By comparison, under the UK Act the Inland Revenue is empowered as the enforcement agency, and its compliance officers have extensive powers of entry and access to records.

<sup>28</sup> Even the Government exerted pressure: see eg M. Wong, "Pay Workers for their Meal Breaks, Minister Says", *South China Morning Post*, 25 Nov 2010, p C2.

<sup>29</sup> See eg S. Cheung, "Boycott against Café de Coral gains support", *South China Morning Post*, 6 Nov 2010, p A2.

<sup>30</sup> See eg A. Wan, "Café de Coral backs down in pay battle", *South China Morning Post*, 7 Nov 2010, p 3.

to avoid the objectives of the new law.<sup>31</sup> However, Hong Kong employers have a history of creativity in evading employment law obligations. For instance, the MWO applies only to “employees”, ie those working under a contract of employment.<sup>32</sup> It is to be hoped that this configuration will not trigger an escalation of the practice of some employers to evade employment law obligations by requiring staff to become engaged as self-employed workers. Sham agreements will not be recognized by the courts, but some employers are nonetheless tempted to engage in this practice in the knowledge that many employees will not know their rights, or at any rate will not bother to litigate.<sup>33</sup>

Honest and transparent record-keeping will also be important. It is perhaps unfortunate that the obligation to keep records of hours worked, originally intended to apply to all employers, is to be relaxed and will apply only in the case of workers whose monthly wages are less than \$11,500. This leaves open the possibility of workers earning near or over that amount, but working excessive hours, falling under the SMW, without proper records being kept.<sup>34</sup> The possibility of that happening may be small, and the inconvenience that would otherwise be caused to employers of only highly paid workers great, but transparency and a cooperative attitude among employers, going beyond that which is strictly required by the law, are essential if this potentially life-changing measure of social reform is to succeed.

For the moment, the enactment of the law can be seen as a victory of sorts, not least for its symbolic value, signalling the possibility of other quality of life measures and protections lacking in Hong Kong employment law but long an integral part of the working culture and social security package in developed economies overseas.<sup>35</sup>

<sup>31</sup> There are some promising signs of change amongst the business lobby. Michael Tien, a well-known entrepreneur and former leader of the pro-business Liberal Party argues that employers should respect the law and look to raise revenues through better business practices: see M. Tien, “Look to your product”, *South China Morning Post*, 17 Nov 2010, p A13.

<sup>32</sup> The trend elsewhere is for progressive labour legislation to apply also to “workers”, those doing work personally for another, and who are not genuinely self-employed: see eg Glofcheski and Aslam (eds), *Employment Law and Practice in Hong Kong* (Hong Kong: Sweet & Maxwell Asia, 2010), Ch 1, in particular, para 1-002.

<sup>33</sup> For an elaboration, see Glofcheski and Aslam (*ibid.*), Ch 2, in particular, para 2-004.

<sup>34</sup> See eg M. Wong, “Wage Cap Opens Door to Exploitation, Unions Say”, *South China Morning Post*, 12 Nov, p A2.

<sup>35</sup> There are signals that a working hours law may be next on the agenda: see eg “Government to Study Standard Working Hours”, *South China Morning Post*, 2 Dec 2010, p C4.